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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Information Builders, Inc.
Opposer,

V.

Bristol Technologies, Inc.,
Applicant
-----X

Opposition No. 91179897

Serial No. 78954755

BRIEF FOR APPLICANT

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June 18, 2010

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I. INTRODUCTION

Opposer has opposed Applicant's application to register its trademark "BRISTOL FOCUS" for use with computer operating system software.

II. BACKGROUND

U.S. Trademark Application Serial No. 78/954,755 was filed by the Applicant on August 17, 2006 for registration of the trademark BRISTOL FOCUS for **computer operating programs**; computers and instructional manuals sold as a unit; and operating system programs" based on use of the mark in commerce under Section 1(a) of the Trademark Law.

On October 5, 2007, following publication of the mark, Opposition No. 91,179,897 was instituted alleging likelihood of confusion with, and dilution of, Opposer's registered FOCUS trademarks.

Opposer instituted this Opposition while not having registered or attempted to register a single trademark including the word "Focus" for use with Computer Operating Programs. This is not for Opposer's lack of software related trademarks. Indeed, Opposer has a number of software related Trademarks and Service-marks related registrations including, but not limited to:

FOCUS, U.S. Trademark Registration No. 1,652,265 for computer programs for data base management. [P. Not. Of Rel. II].

FOCUS, U.S. Service Mark Registration No. 2,606,298 for computer services, namely, providing online information to facilitate demonstration, test use, and ordering of computer software.

FOCUS, U.S. Trademark Registration No. 2,821,942 for computer software for database management; computer

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software for use in decision support systems; computer software for use in enterprise reporting and analysis systems and for building applications for the management and tracking of data for enterprise reporting systems; computer database programs for use in connection with decision support, analysis, and reporting programs; computer software development tools for use in developing decision support, analysis, and reporting systems and applications; computer software, namely, client/server reporting, analysis and decision support tools; computerized database, reporting, and analysis software for use on corporate intranet web sites; enterprise server software for use in web based data publishing, reporting, and analysis solutions; computer software for accessing databases by means of global computer networks to generate reports; software development tools for making reporting and analysis available through global computer network worldwide websites and for extending the functionality of enterprise reporting and analysis systems on to global computer networks; and computer software for accessing and updating databases through global computer networks.

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III. THE RECORD

The record comprises the following evidence:

1. Transcript of direct and cross examination
Testimony of Gerald D. Cohen, President of Opposer since
Opposer's inception in 1975 (hereinafter "Cohen, [pg. #,
line #]");
2. Exhibits 1-87 referred to in the Cohen testimony;
3. Opposer's Notice of Reliance under Rule 2.120(j)
dated November 25, 2009 (hereinafter "[P. Not. Of Rel.
I]");
4. Opposer's Notice of Reliance under Rule 2.122(d)
dated November 25, 2009 (hereinafter "[P. Not. of Rel.
II]");
5. Opposer's Notice of Reliance under Rule 2.122(e)
dated November 25, 2009 (hereinafter "[P. Not. of Rel.
III]"); and
6. Applicant's Notice of Reliance under Rule 2.122(e)
dated January 29, 2010 (hereinafter "[D. Not. Of
Rel.]").

Applicant took no testimony.

IV. THE ISSUES

The issues to be determined are

1. Whether Applicant's declaration that "[t]he substitute specimen(s) was in use in commerce as of the filing date of the application" was false and was not made with a reasonable and honest belief that it was true thereby constituting fraud on the Patent and Trademark Office.

2. Whether there is a likelihood of confusion between Applicant's trademark BRISTOL FOCUS for the goods identified in its application, and any one or more of Opposer's family of "Focus" marks, namely, FOCUS, PC/FOCUS, WebFOCUS, and FOCUS FORECASTING, used on the variety of computer software products described above.

There is no issue concerning priority of use. Opposer first used its trademark FOCUS in 1975.

V. THE FACTS

David Bristol is President of Applicant, Bristol Technologies, Inc. [Affidavit of David Bristol filed October 27, 2008].

The first alleged use of the mark BRISTOL FOCUS was in a newspaper ad published in the Bozeman Daily Chronicle newspaper on July 25, 2006 associating the mark with Bristol Technologies and its product line. [P. Not. of Rel. I, Interrogatory Answer No. 30]. Between July 20, 2006 and July 25, 2006 applicant's only actions to bring about use of Applicant's mark "Bristol Focus" in commerce was to correspond with his attorney. Opposer's interrogatory No. 32 and Applicant's answer are:

"Interrogatory No. 32

(a) Fully describe the method by which the image of the words "Bristol" and "Focus" followed by the initials "TM" and "SM" as shown in the substitute specimen filed in the Patent and Trademark office on July 15, 2007 was created prior to being photographed;

(b) Identify the person(s) who created the image referred to in paragraph (a) above;

(c) Stated the date on which the image referred to in paragraph (a) above was created;

(d) State the date on which the image referred to in paragraph (a) above was photographed for use as the substitute specimen;

(e) Identify the computer software, if any, that displayed the image referred to in paragraph (a) above on a video display while it was being photographed for use as a substitute specimen;

(f) State the content of each and every copyright notice

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that appeared in the computer software referred to in paragraph(e) above;

(g) Identify the make, model, and year of the purchase of the video display on which the image referred to in paragraph (a) above was displayed while the substitute specimen was being photographed;

(h) State the purpose for which the image referred to in paragraph (a) above was created;

(i) Identify each and every item of computer hardware on which the Mark Bristol FOCUS appeared on July 15, 2007;

(j) Identify the person who photographed the image referred to in paragraph (a) above for use as a substitute specimen;

Answer No. 32

(a) The file source code is in Microsoft Power Point and exported to a JPG file. Bristol Home Central ® system took in that image.

(b) David W. Bristol created the image.

(c) The file date I have on my office machine is dated is Feb 22, 2007.

(d) The photo is dated March 26, 2007.

(e) The computer software that displayed the image is Bristol Focus TM.

(f) From the file "Working_DisplayCentral.c" dated Aug 29, 2006 the following copyright notices are provided below:

```
// COPYRIGHT (c) 2006 Bristol Technologies, Inc.  
//  
// Bristol Home Central is a Trademark of Bristol  
Technologies, Inc.  
// Bristol Focus is a Trademark of Bristol Technologies,  
Inc.  
//
```

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```
// This work contains valuable confidential and
proprietary information
// of Bristol Technologies, Inc. Disclosure, use or
reproduction without
// the prior written authorization of Bristol
Technologies, Inc. is prohibited.
//
// Title: DisplayCentral.c
//
// Purpose: This is the main process for the TMS320 DSP.
The following tasks
// are responsible for the operation of the VGA
display system, camera
// video storage, video retrieval, video transport
to Home Central.
//
```

Taken from another file "DiskDrive.c" dated Aug 10, 2006
the following content was cut and past:

```
// COPYRIGHT (c) 2006 Bristol Technologies, Inc.
//
// Bristol Home Central is a Trademark of Bristol
Technologies, Inc.
// Bristol Focus is a Trademark of Bristol Technologies,
Inc.
//
// This work contains valuable confidential and
proprietary information
// of Bristol Technologies, Inc. Disclosure, use or
reproduction without
// the prior written authorization of Bristol
Technologies, Inc. is prohibited.
//
// Title: DiskDrive.c
//
// Purpose: This file contains the tasks and drivers to
access and use the
// hard disk drive system.
//
```

- (g) the make, model, and year of the purchase of the
video display on which the image referred to in
paragraph (a) above was displayed while the

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substitute specimen was being photographed was an
NEC ASLCD92V-BK, purchased on Oct 21, 2005.

- (h) The image is used to identify to users and viewers of this product that this product created by Bristol Technologies, Inc.
- (i) The image was only applied to the units in the photos.
- (j) The photos were taken by David W. Bristol of *Technologies, Inc.* ". - [P. Not. of Rel. I, *Interrogatory Answer No. 32*]

VI. ARGUMENT

A. Fraud on the Patent and Trademark Office

The standard by which the question of fraud must be determined was set forth in *In re Bose Corporation*, 580 F.3d 1240, 91 U.S.P.Q. 2d (Fed. Cir. 2009). It is insufficient to merely prove that the Applicant knew or should have known that the allegation of use of the mark prior to the filing date of the application was false. Subjective intent to deceive must be shown.

"A trademark is obtained fraudulently under the Lanham act only if the Applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO." *Id.*

However, one need not be a mind reader to determine whether fraud was committed. Indirect and circumstantial evidence of intent to deceive the Patent and Trademark Office can suffice in the absence of direct evidence of Applicant's intent.

"Of course, because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, an inferences drawn from lesser evidence cannot satisfy the deceptive intent required." *Id.*

The evidence shows:

1. The application was filed on August 17, 2006. In order for an application based on use to have been valid, first use of the mark in commerce must have taken place prior to the filing date.
2. In the original application, as filed, Applicant alleged first use of the mark in commerce on July 25, 2006.
3. The specimen submitted with the application that was

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filed on August 17, 2006 was a classified ad, which appeared under "Legals" in the Bozeman Daily Chronicle published July 25, 2006. The ad announced that Applicant, Bristol Technologies, Inc. was giving notice that it "intends to use" the trademark "Bristol Focus".

It DOES NOT follow from the statement of intent in the classified ad that, as of July 25, 2006, Applicant had not yet used the mark. Advertising and promotion of products in the Media takes many forms and is almost always targeted to the audience of the media in which the ad appears. In this case the ad was, or could have been, placed to inform this particular audience of Bristol Technologies intent to use its mark "Bristol Focus" in the region which this newspaper is distributed. As such it makes no statement about Bristol Technologies' use in interstate commerce. Applicant does not agree that the statement of intent in the ad did ruled out the possibility of use of the mark during the approximately three weeks between July 25, 2006 when the ad was published and August 17, 2006 when the application was filed.

While Applicant may or may not agree with Opposer's interpretation of Applicant's answers to Opposer's Interrogatories Nos. 1, 7, 14, 27, and 28, Applicant does not agree that the mere absence of use in that time period would prove an intent to deceive the Patent and Trademark Office at the time the application was filed, nor at the time the substitute specimen was provided, nor when the application when amended to an Intent to Use Application. However, it does reflect the evolving nature of Applicant's understanding of the availability of meetings with prospective clients as evidence of use in commerce, where

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such prospective clients were unwilling to substantiate said meetings for business and other reasons.

In an office action dated January 12, 2007, the Examining Attorney objected to the copy of the classified add as an unacceptable specimen for showing trademark use, carefully explained why the specimen ad submitted by Applicant was not adequate to show trademark use, and set forth examples of specimens that show use of a mark on goods or packaging. Finally, the Examining Attorney suggested that if Applicant had not made use of the mark in commerce, the basis of the application could be amended from use under Section 1(a) to intent to use under Section 1(b).

Applicant did not, at that time, amend to Section 1(b). Instead, Applicant responded to the examiner by providing a substitute specimen of the mark in the form of a photograph, taken on March 26, 2007, of the mark "Bristol Focus" displayed on a computer screen said display produced by software for displaying the mark on a computer screen.

Intent to deceive the PTO is not demonstrated by Applicant's filing of a response on July 15, 2007 to the January 12, 2007 office action. Opposer misinterprets Applicant's answer to Opposer's interrogatory Number 32. Applicant stated that the picture was taken on March 26, 2007 from a software file which was created on February 22, 2007.

However, Applicant's answer to Opposer's interrogatory 32 goes on to show that the Copyright date of the software contained in that file was 2006, leaving plenty of time for Applicant to have used that software to show Applicants Trademark "Bristol Focus" to clients on a machine running

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Applicant's Operating System software prior to August 17, 2006.

Due to the transient nature of such client demonstrations and the unwillingness of such clients to substantiate those meetings for business reasons of their own, when Applicant responded to the interrogatories in the present Opposition, no such meetings proved to have sufficient tangible proof available to sustain applicant's good faith believe of August 17, 2007 that Applicant had used its mark in commerce prior to August 17, 2006.

It is true that when the declaration was filed on July 15, 2007, no computer systems had been shipped. [P. Not. of Rel. I, Interrogatory Answer No. 28], no computer operating program had been completed, and no computer operating program had been distributed or shipped [P. Not. of Rel. I, Interrogatory Answer No. 29].

However, if software developers waited until all defects were removed and all functions were completed before attempting to market their products few software products would be on the market today. The completeness or correctness of Bristol Technologies Operating System Software is not relevant, because it is well known in the software industry that incomplete products are demonstrated to prospective buyers and in fact often sold with knowledge that defects will be uncovered through buyer use of the product.

Applicant did not understand when the application was signed on or about August 17, 2006 that running of the classified ad did not constitute use of the mark sufficient to obtain a trademark registration.

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Applicant's substitution of a new specimen after learning of the initial refusal, and the examining Attorney's subsequent allowance of the Applicant's application, constitute clear and convincing evidence that Applicant understood the Examining Attorney's explanation and sought to provide, and succeeded in providing, a specimen which complied with the requirements. That Opposer has misinterpreted Applicant's answers to Interrogatory 32 is no proof of fraud.

B. Likelihood of Confusion Between the Mark BRISTOL FOCUS and the Registered Trademark FOCUS

The following analysis of the duPont factors, In re E.I. duPont de Nemours & Co., 177 USPQ 563, 567 (CCPA 1973), will make clear that no likelihood of confusion exists between Opposer's and Applicant's marks as applied to their respective goods.

The DuPont factors:

1. The Similarity or Dissimilarity of the Marks in their Entireties as to Appearance, Sound, Connotation and Commercial Impression.

Applicant's mark consists of two terms. The first is the surname of Applicant's president. The second term is Opposer's registered trademark. Surnames are not considered distinctive and are normally require a disclaimer.

It is worthy of note that the record shows no requirement for Applicant to submit a disclaimer of the term "Bristol". Further, Opposer ignores the mandate that the **marks be considered in their entirety**. The term "Bristol" does not appear in any of Opposer's applications or registrations. When compared **in their entirety** "Bristol Focus" cannot be mistaken for any of Opposer's marks.

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Further, Opposer provides no evidence, nor is there any evidence in the record that the public would confuse "Bristol Focus" with any of Opposer's marks.

2. The Similarity or Dissimilarity and Nature of the Goods or Services as Described in an Application Or Registration or in Connection with which a Prior Mark is in Use.

Applicant's software products are operating systems with which other software programs, such as Opposer's FOCUS programs, collaborate to accomplish their functions.

In the deposition of Gerald D. Cohen of November 13, 2009, Mr. Cohen, the owner and founder of Opposer, Information Builders, Inc. stated that

"We do not offer an operating system".

"Cohen, [pg. #72, line 8,9]

Mr. Cohen went on to explain that

"Well, the operating system it's just software that's closer related program that runs it. But it's usually identified with a piece of Hardware. And we're very much independent. We run on operating systems or hardware. Sometimes actually a ZIIP chip we have, depends on the hardware that bounds us, and the operating system and the chip bind together.".

"Cohen, [pg. #72, line 11 through 18]

Webster's dictionary defines operating system as

"Software that controls the operation of a computer and directs the processing of programs (as by assigning storage space in memory and controlling input and output functions)" - *[D. Not. Of Rel. page 1 line 25 through 31, citing to Page 115, lines 9-11 of the first column, of Merriam Webster's Collegiate Dictionary (tenth Edition) Copyright 1993, Merriam Webster, Incorporated].*

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The American Heritage Dictionary defines operating systems as

"Computer Software designed to complement the hardware of a specific data processing system." [D. Not. Of Rel. Page 1 line 32-34 citing Page 71, lines 72,73 of the first column, of *The American Heritage Dictionary (Second College Edition) Copyright 1982, Houghton Mifflin Company*].

Roger Pressman defines system software as

"a collection of programs written to service other programs" [D. Not. Of Rel. page 2 lines 4 through 6 citing to Page 12, lines 8-15, of *Software Engineering, A practitioner's Approach by Roger Pressman, Copyright 1987, McGraw Hill, Inc.*].

It is clear from these definitions and Mr. Cohen's own testimony *Ibid* that the Nature of the Goods and Services offered by Applicant and those offered by Opposer are sufficiently different from each other that no likelihood of confusion can arise.

3. The Similarity or Dissimilarity of Established, Likely-To-Continue Trade Channels.

Opposer's goods are computer software programs designed to run on computers and on almost any operating system.

Applicant's goods consist of operating systems and computers that use Applicant's operating systems. When there are no limits on channels of trade or classes of consumers in identifications, and there are none in the involved identifications, it must be assumed that the goods can be marketed to all typical classes of consumers for such goods and through all customary channels of trade for

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such goods. In re Elbaum, 211 USPQ 639, 640 (T.T.A.B. 1981).

Mr. Cohen's statement that "Well, the operating system it's just software that's closer related program that runs it. But its usually identified with a piece of Hardware. And we're very much independent." Cohen, [pg. 72, line 11 through 18] makes clear that the offering of Operating system Software is made in conjunction with the sale of computer hardware. While Mr. Cohen also makes clear that Opposer's software offerings are independent of the operating system when he states "And we're very much independent". Ibid

These admissions serve to establish that at least two classes of trade channels exist and that Applicant and Oposser operate in their respective channels.

4. The Conditions Under which and Buyers to Whom Sales are Made, i.e., Impulse vs. Careful Sophisticated Purchasing

There is no direct evidence in the record as to the level of sophistication of Opposer's or Applicant's goods or whether or not purchases would be made on impulse.

5. The Fame of the Prior Mark (Sales, Advertising, Length of Use) .

Opposer has stated its sales, Advertising, and Length of use. Yet this remains a subjective determination because no specific values are established for these parameters. Applicant does not claim to have the Sales, Advertising, or Length of Use claimed by Opposer. Yet such well known Companies as Apple and Microsoft clearly outstrip Opposers sales and Advertising.

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Of necessity the fame of the mark remains unproven and is a matter of fact left for the finder of fact to determine.

6. The Number and Nature of Similar Marks in use on similar goods.

Applicant took no testimony, and hence there is no evidence of use (even by Applicant) of any trademark, for computer software, including the word "Focus", other than the uses by Opposer. When IBI has become aware of an infringing trademark it has taken action. [pg. 63, line 24] - [pg. 64, line 6], including the commencement of some 300 opposition proceedings [P. Not. of Rel. III].

However, absence of evidence is not evidence of absence. The record does show that Opposer has methodically Opposed registration of marks including the term "focus" for use with Software. However, the record also **does not show** any use of the term "Focus" being used with Operating System Software, a product which Opposer has admitted it does not offer. Further, there is no evidence in the record that Opposer has searched diligently, or otherwise, for common-law use of the Term "Focus" in conjunction with the offering of software.

Therefore, the absence of evidence not being evidence of absence, the Number and Nature of Similar Marks in use on Operating Systems Software and computer Hardware is unknown.

- 7. The nature and extent of any actual confusion, and**
8. The length of time during and condition under which there has been concurrent use without evidence of actual confusion.

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There is no evidence of actual confusion in the record.

9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).

Opposer owns a "family" of FOCUS marks for its various software products. [pg. 5 lines 2-8]; [PX-8,15,16,17,18,19,20,22,23,24,25,29,30,31,32,33,34,35,36,37]. Thus, Opposer asserts, Applicant's mark might very well be taken as just another one of Opposer's family of marks. Moreover, Opposer sells a wide variety of software products, which perform many functions, on different platforms, all under its various "Focus" marks.

However, Operating System Software is not among that family of products for reasons stated above by Mr. Cohen on behalf of Opposer and therefore Applicant's use of its distinctive mark "Bristol Focus" is not likely to be confused with Opposer's "Family Mark" when used in conjunction with Applicant's applied for goods, namely Operating systems.

10. Market Interface

This factor as defined in DuPont is not applicable to the current situation.

11. The Extent to which Opposer has a Right to Exclude Others from use of its Mark on its Goods.

Opposer has been diligent in objecting to the use of "Focus" trademarks by others on computer software. As a result of its activity, Opposer has firmly established its right to exclude others from using "Focus" trademarks on software. More specifically, Opposer has, since 1985, filed approximately three hundred Notices of Opposition in the Patent and trademark Office, and three petitions for

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cancellation (Ex. 30). In almost all cases which have been terminated, the opposition has been sustained (by default or concession on the part of the Applicant), and the cancellation petitions have been granted. In some cases, the opposition proceedings have been settled, and withdrawn, after the identification of goods in the application was amended to make clear that the mark is not used on computer software. Opposer has also litigated infringement of its FOCUS trademark in the U.S District Court for the Southern District of New York and obtained a consent judgment of infringement. [P. Not. of Rel. III]. This history makes two things clear. Opposer has gone through great expense over the years to protect its rights in the trademark FOCUS and its other "Focus" trademarks. In addition, this history shows that the industry has recognized Opposer's rights in "Focus" trademarks as applied to computer software. It is submitted that there can be no more persuasive proof of the strength of Opposer's rights than recognition of those rights by those active in the market place.

We agree, but maintain that the record also shows that in no case was the defending applicant's offerings limited to or inclusive of Operating system Software as in the present case. Therefore, Opposer's right to exclude others from using its mark with Operating System Software has not been established.

12. The Extent of Potential Confusion, i.e., Whether de Minimis or Substantial

The only portion of Applicant's mark which is not a surname is the word "Focus". This portion of Applicant's mark is identical to Opposer's trademark FOCUS, and

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identical to the arbitrary portions of Opposer's other "Focus" trademarks.

Indeed, Applicant's software is of the type which all users of Opposer's FOCUS software concurrently use with it. All of Opposer's FOCUS software runs in collaboration with operating system software.

First, Opposer ignores the mandate that the marks be considered in their entirety. The term "Bristol" does not appear in any of Opposer's applications or registrations. When compared in their entirety "Bristol Focus" cannot be mistaken for any of Opposer's marks.

Second, the use of software in collaboration with operating system software is no more likely to cause confusion because of collaborative use than confusing the brand name of a frying pan with the brand name of a kitchen stove. Just because items are used in collaboration doesn't necessarily elevate the likelihood of confusion and there is no evidence in the record that such collaboration produces any increase in the likelihood of confusion.

Further, Opposer provides no evidence, nor is there any evidence in the record that the public would confuse "Bristol Focus" with any of Opposer's marks.

VII. SUMMARY AND CONCLUSION

Applicant seeks to register the mark "BRISTOL FOCUS" for use with operating system software alone or installed on computer hardware.

In good faith Applicant applied to register its mark and then, when the original specimen was discovered to be unacceptable, then, also in good faith, attempted to replace the original specimen. **Opposer has not shown that Applicant committed Fraud** upon the Patent and Trademark Office. Therefore the allegation of Fraud by the Applicant should be dismissed.

Opposer owns and uses a variety of "Focus" trademarks for software adapted to run in collaboration with almost any operating system software. Applicant intends to use its mark on operating system software, a distinct type of software.

Opposer: 1) does not now offer, 2) has never offered, and 3) has shown no evidence of intending to offer in the future, any Operating System software product. **Opposer admits Operating System Software is distinct from any product now offered or offered in the past by Opposer.**

Therefore, there is no substantial likelihood that users of the respective products of the parties will be confused as to the source or sponsorship of Applicant's operating system.

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Therefore, there is no likelihood of confusion between Applicant's mark and Opposer's "Focus" family of Marks, nor has Applicant acted in other than good faith. Consequently, this opposition should be denied and registration allowed to Applicant.

Respectfully Submitted
Bristol Technologies, Inc.



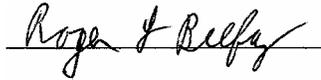
Dated: June 18, 2010

Roger L. Belfay
Attorney for Applicant
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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Notice of Reliance under Rule 2.122(e) has been forwarded, this June 18, 2010 by first class mail to

Howard F. Mandelbaum
222 Bloomingdale Road
Suite 203
White Plains, NY 10605

A handwritten signature in cursive script, reading "Roger L. Belfay", is written over a horizontal line.

Roger L. Belfay, Attorney at Law